DIVISION III

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION

CACR04-1134

September 27, 2006

ARTIS LEE WILLIS
APPELLANT
v.

STATE OF ARKANSAS
APPELLEE

AN APPEAL FROM THE LAFAYETTE COUNTY CIRCUIT COURT
[CR-03-52-2]

HONORABLE JIM HUDSON, JUDGE

AFFIRMED; COUNSEL'S MOTION GRANTED

OLLY NEAL, Judge

Appellant Artis Lee Willis was convicted of five counts of delivery of marijuana and one count of possession of marijuana with intent to deliver. He was sentenced to ten years' imprisonment on each count. The sentences are to be served consecutively.

Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Rule 4-3(j) of the Rules of the Arkansas Supreme Court and Court of Appeals, appellant's counsel has filed a motion to withdraw on the ground that this appeal is wholly without merit. The motion was accompanied by a brief purportedly discussing all matters in the record that might arguably support an appeal, including the adverse rulings, and a statement as to why counsel considers each point raised as incapable of supporting a meritorious appeal. Appellant was provided with a copy of his counsel's brief and notified of his right to file pro se points for reversal. Appellant has elected to file points for reversal. We affirm appellant's conviction and grant

counsel's motion to be relieved.

Sufficiency of the Evidence

Appellant's counsel lists sixteen adverse ruling including the denial of appellant's motions for directed verdict. Because of double jeopardy concerns, we will begin by first addressing the trial court's denial of appellant's motions for directed verdict. *See Deshazo v. State*, ___ Ark. App. ___, ___ S.W.3d ___ (June 21, 2006).

A motion for directed verdict is treated as a challenge to the sufficiency of the evidence. *Tillman v. State*, ___ Ark. ___, ___ S.W.3d ___ (Nov. 17, 2005). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Byrd v. State*, 337 Ark. 413, 992 S.W.2d 759 (1999). Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Watson v. State*, 358 Ark. 212, 188 S.W.3d 921 (2004).

Here, pursuant to Ark. Code Ann. § 5-64-401(a) (Repl. 2005), appellant was charged with six counts of manufacturing, delivery, or possession of a controlled substance, marijuana. At the close of the State's case, appellant made a motion for directed verdict. He argued that the State had failed to prove that he was indeed the person wanted for the crime. He specifically pointed out that because two addresses were listed in the documentation relied upon by the police the documentation was inaccurate. The trial court denied appellant's motion. Appellant renewed his motion at the close of all the evidence and, again,

the trial court denied his motion.

During appellant's trial, Linda Card, chief investigator for the South Central Drug Task Force, testified that the address on the outside of appellant's home was "407 Walnut." She explained that, however, 911 listed the address as "413 Walnut." Card further testified that, while working undercover, she had purchased marijuana from appellant at that particular residence and from the stand she identified appellant.

Appellant denied selling drugs to Card. He tried to put forth evidence that he was living in Dallas at the time the offenses occurred. However, during his testimony, appellant admitted that when the officers searched his home, he did in fact have two bags of marijuana in his home.

The credibility of witnesses is an issue for the jury and not the court. *Tillman v. State*, *supra*. The trier of fact is free to believe all or part of any witness's testimony and may resolve questions of conflicting testimony and inconsistent evidence. *Id*. Furthermore, a jury is not required to believe the defendant's version of events because he is the person most interested in the outcome of the trial. *Turbyfill v. State*, ___ Ark. App. ___, ___ S.W.3d ___ (June 29, 2005). Accordingly, we hold that there was sufficient evidence to support appellant's conviction.

Change of Venue

The second adverse ruling is the denial of appellant's motion for change of venue. A change of venue should be granted only when it is clearly shown that a fair trial is not

likely to be had in the county. *Baughman v. State*, 353 Ark. 1, 110 S.W.3d 740 (2003). This requires a movant to show that there is countywide prejudice against him. *Id*. A defendant is not entitled to jurors who are totally ignorant of the facts surrounding the case, as long as they can set aside any impression they have formed and render a verdict solely on the evidence at trial. *Porter v. State*, 359 Ark. 323, 197 S.W.3d 445 (2004). On appellate review, we review the denial of a motion for a change of venue for abuse of discretion. *Id*.

In the present case, following appellant's arrest, the local newspaper ran an article about appellant's arrest that featured a photograph of appellant leaving the jail in handcuffs. Thereafter, appellant filed a motion for change of venue and attached to the motion three affidavits, including his own, indicating that, based on the newspaper article, the affiant did not believe that appellant would receive a fair trial in Lafayette County. However, during the hearing on appellant's motion, the affiants, excluding appellant, testified that they believed appellant would receive a fair trial. In addition to the testimony from the affiants, the State presented the testimony of several citizens who testified that they did not recall seeing the article and that they knew nothing about appellant's pending case.

Based upon the evidence presented during the hearing, we cannot say that the trial court abused its discretion in denying appellant's motion for change of venue. Therefore, we conclude that this point also lacks merit.

Motion to Suppress

The next two adverse rulings concern the denial of appellant's motions to suppress.

In reviewing a trial court's denial of a motion to suppress evidence, we conduct a de novo review based on the totality of the circumstances, reviewing findings of historical fact for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, giving due weight to inferences drawn by the trial court. *Swan v. State*, __ Ark. App. __, ___ S.W.3d ___ (Feb. 1, 2006). We defer to the credibility determination made by the trial judge when weighing and resolving facts and circumstances. *Id*.

First, during the execution of the arrest warrant, the officers smelled marijuana and observed contraband in plain view. Based upon what they had smelled and observed the officers conducted a search of appellant's home. During the search, the officers seized several items of contraband including two bags of marijuana. Appellant then sought to suppress the evidence seized during the search.

It has been recognized that the smell of marijuana is sufficient to establish probable cause to search. *McDaniel v. State*, 337 Ark. 431, 990 S.W.2d 515 (1999). Furthermore, under the plain view doctrine, police officers who are legitimately at a location and acting without a search warrant may seize an object in plain view if they have probable cause to believe that the object is either evidence of a crime, fruit of a crime, or an instrumentality of a crime. *Newton v. State*, ___ Ark. ___, ____ S.W.3d ___ (June 222, 2003) (quoting *Fultz v. State*, 333 Ark. 586, 593, 972 S.W.2d 222, 224-25 (1998)). The fact that the officers smelled marijuana was by itself sufficient evidence of probable cause. However, here the inference of probable cause was strengthened by the fact that several items of contraband were in plain

view of the officers. Accordingly, this point lacks merit.

Appellant also sought to suppress two statements that he made in the absence of his Miranda warning. Appellant made the first statement to Officer George Godwin of the Arkansas State Police. Officer Godwin testified that prior to administering appellant his *Miranda* warning, appellant asked if he could ask Officer Godwin a question. Officer Godwin replied "sure" and appellant asked why the officers had entered his home. Officer Godwin testified that he then:

> [E]xplained that the officers were attempting to write a search warrant for his house because when they had arrested him, they smelled marijuana and he told me, without being questioned, you know, I didn't ask him any questions. "They couldn't have smelled marijuana unless they went into my bedroom."

Appellant made the second statement to Linda Card during his first appearance. Card testified that after the trial court had advised appellant of his *Miranda* rights, appellant asked her to come over so he could ask her something. When she came over, appellant asked what was found during the search of his home. Card informed him that marijuana was found. Appellant then asked how much and Card told him an approximate amount. Appellant replied "That much? Wasn't it mostly stems?" Appellant then proceeded to ask "In two plastic bags? But there was marijuana?" To which Card replied, "yes."

In determining whether appellant's statements were voluntary, we evaluate the totality of the circumstances and reverse only if the trial court's finding is clearly against the preponderance of the evidence. *Weber v. State*, 326 Ark. 564, 933 S.W.2d 370 (1996). Here, the trial court found that the statements were spontaneous, self motivated, and that the State

had not done anything to elicit the statements.

The *Miranda* warning is not required for voluntary, spontaneous statements. *Weber v. State*, *supra*. A spontaneous statement is admissible because it is "not compelled or coerced in any way significant under the Fifth Amendment's privilege against self-incrimination." *Id*. The evidence clearly establishes that appellant's statements were voluntary. Therefore, the trial court did not err when it refused to suppress the statements.

Motion to Strike Potential Juror and Batson Challenge

The next adverse rulings occurred during the seating of the jury. First, the trial court denied appellant's motion to strike a potential juror for cause because appellant failed to state a basis. The decision to excuse a juror for cause will not be reversed absent an abuse of discretion. *Spencer v. State*, 348 Ark. 230, 72 S.W.3d 461 (2002). Persons comprising the venire are presumed to be unbiased and qualified to serve, the burden is on the party challenging a jury to prove actual bias. *Id*. When a juror states that he or she can lay aside preconceived opinions and give the accused the benefit of all doubts to which he is entitled by law, a trial court may find the juror acceptable. *Id*.

Here, the potential juror stated that he/she believed that "everyone is innocent until proven guilty beyond a reasonable doubt." Furthermore, appellant failed to provide a reason as to why this particular juror was objectionable. Therefore, the trial court did not abuse its discretion when it found the juror acceptable.

Appellant also made a *Batson* challenge. Under *Batson v. Kentucky*, 476 U.S. 79

(1986), a prosecutor in a criminal case may not use his peremptory strikes to exclude jurors solely on the basis of race. *Ratliff v. State*, 359 Ark. 479, ____ S.W.3d ___ (2004). In determining whether such a violation has occurred, a three-step analysis is applied. *Stokes v. State*, 359Ark. 94, 194 S.W.3d 762 (2004). The first step requires the opponent of the peremptory strike to present facts that show a prima facie case of purposeful discrimination. *Id*. This first step is accomplished by showing the following: (a) the opponent of the strike shows he is a member of an identifiable racial group; (b) the strike is part of a jury-selection process or pattern designed to discriminate;(c) the strike was used to exclude jurors because of their race. *Id*. (citing *MacKintrush v. State*, 334 Ark. 390, 978 S.W.2d 293 (1998)). Once a prima-facie case of discrimination has been shown, the process moves to the second step, wherein the burden of producing a racially neutral explanation shifts to the proponent of the strike. *Id*. If a race-neutral explanation is given, the inquiry proceeds to the third step, in which the trial court must decide whether the opponent of the strike has proven purposeful discrimination. *Id*.

We will reverse a trial court's findings on a *Batson* objection when the trial court's decision was clearly against the preponderance of the evidence. *Ratliff v. State*, *supra*. Appellant is unable to even make it over the first hurdle in proving a primae facie case of discrimination. Here, five out of the eleven jurors seated were African-American. Moreover, the State demonstrated to the trial court that it had used its strikes to strike both African-Americans and Caucasians. Based on this evidence, the trial court did not err when

it denied appellant's *Batson* objection.

Evidentiary Rulings

The following evidentiary rulings also occurred during appellant's trial. The first concerned the admissibility of six tape recordings made during several controlled buys. Appellant made a pretrial motion objecting to the tape recordings and renewed his motion during the course of his trial. Appellant argued that portions of the recordings were unintelligible and of such poor quality they would not be of any assistance to the jury. He also argued that the unintelligible portions might contain exculpatory evidence or reveal misconduct on the part of the police. The admissibility of tape recordings containing inaudible portions is a matter within the sound discretion of the trial court, and we will not reverse unless there has been an abuse of that discretion. *Walker v. State*, 13 Ark. App. 124, 680 S.W.2d 915 (1984).

Linda Card testified that she made the tapes during the purchases she made from appellant. She testified that the unintelligible portions were an accurate reflection of what had transpired. Card explained to the trial court that during those buys nothing occurred that would exonerate appellant. She also explained that there was no misconduct on the part of the police department.

Based on this testimony, appellant is unable to demonstrate that the trial court abused its discretion in admitting the tapes and we conclude that this point also lacks merit.

During the suppression hearing, appellant made a hearsay objection to the affidavit

for search warrant. We will not reverse a trial court's ruling on a hearsay question unless the appellant can demonstrate an abuse of discretion. *Hutcheson v. State*, ___ Ark. App. ___, ___ S.W.3d __ (Sept. 14, 2005). Hearsay is defined as a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted. Ark. R. Evid. 801(c). As a general rule hearsay is inadmissible. *Hutcheson v. State*, *supra*.

Here, the trial court ruled that the affidavit for search warrant would be used to determine the merits of appellant's motion to suppress. This was not an abuse of discretion by the trial court.

The next adverse ruling concerned the admissibility of State's exhibits 7-11. These exhibits consisted of various items that were seized from appellant's home and tested by the State crime lab. Trial courts have broad discretion with regard to evidentiary rulings, and when reviewing a ruling on the admissibility of evidence, the trial court should not be reversed absent an abuse of discretion. *Simmons v. State*,___ Ark. App. ___, ___ S.W.3d ___ (Apr. 19, 2006).

Appellant is unable to demonstrate that the trial court abused its discretion in admitting State's exhibits 7-11. He also argued that there was no foundation for the admission of State's exhibits 7-11. Likewise, appellant is unable to demonstrate that the trial court abused its discretion when it overruled his lack of foundation objections.

The abstract reveals that appellant raised a speculation objection during Detective

Card's testimony. During the State's questioning of Detective Card concerning the tape recordings, the State asked Detective Card if the other people that were present were also there to purchase drugs from appellant. Appellant objected, arguing that the question called for speculation. The trial court informed Detective Card to answer based on her own observation, otherwise, it was going to sustain the objection. The appellant achieved the result that he desired, so, this objection lacks merit.

Appellant also objected when Detective Card asked to speak to the prosecutor. Appellant's objection was a general objection and he did not give specific grounds for his objection. The specific ground of an objection must be stated if the specific ground was not apparent from the context. *Gaines v. State*, 340 Ark. 99, 8 S.W.3d 547 (2000). Here, the specific ground was not obvious. Because appellant failed to state the grounds for his objection, this point lacks merit.

The final adverse ruling occurred when appellant raised a hearsay objection to State's exhibit 24, a photograph of his home. As stated earlier, we will not reverse a trial court's ruling on a hearsay question unless the appellant can demonstrate an abuse of discretion. *Hutcheson v. State*, *supra*. Hearsay is defined as a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted. Ark. R. Evid. 801(c). As a general rule hearsay is inadmissible. *Hutcheson v. State*, *supra*.

Appellant is unable to demonstrate that the trial court abused its discretion in

admitting the photograph. Therefore, this point also lacks merit.

Pro Se Points

Appellant also brings forth twenty-one points as to why his convictions should be reversed. In his first five points, appellant sets forth arguments alleging that the State violated its duty to pursue evidence that would exonerate appellant. Appellant specifically argues: the prosecutor must show due diligence and good-faith in securing a witness for trial; that he informed the arresting officers and his attorney that he had an alibi and gave them the names of his witnesses; because the officer's knowledge is imputed to the State, the State was unprofessional in its failure to pursue evidence that would aid appellant; the State's failure to pursue the exonerating evidence was so prejudicial and overzealous, a new trial was warranted; and his alibi would have proven his innocence and the State's failure to investigate his alibi violated his fundamental right to due process. In its brief the State points out that appellant's arguments are not preserved for appellate review because they are being raised for the first time on appeal. We agree. It is well settled that we will not consider arguments raised for the first time on appeal. *Simmons v. State*, supra.

In points six through thirteen, appellant challenges his sentences. He argues that: (1) he was deprived of his right of allocution; (2) the trial court violated Ark. Code Ann. § 16-90-106(b) when it failed to inform him "of the nature of the indictment, plea, and verdict;" (3) the consecutive sentences were imposed for one continuing criminal enterprise, thus, violating the principles of double jeopardy; (4) pursuant to Ark. Code Ann. § 16-90-

804(a)(3), the trial court was required to provide written justification for each consecutive sentence; (5) the sentences were unjust and resulted in a denial of equal protection; (6) the "unjustified" consecutive sentences amounted to a life sentence and constituted a denial of equal protection; (7) his sentences were so out of proportion, that it amounted to cruel and unusual punishment; (8) the trial court should have imposed concurrent sentences. These arguments are not preserved. Again, appellant failed to raise these arguments below and prior to having the merits of his arguments addressed on appeal, appellant must first give the lower court the opportunity to address them. *See Taylor v. State*, ___ Ark. App. ___, ___ S.W.3d ___ (Jan. 18, 2006).

Appellant also raises points fourteen and fifteen for the first time on appeal. In those points appellant attempts to raise an entrapment defense. However, even if appellant's arguments had been preserved, we would be required to affirm. Arkansas Code Annotated section 5-2-209(b)(1) (Repl. 2006) provides that entrapment occurs when:

> [A] law enforcement officer or any person acting in cooperation with a law enforcement officer induces the commission of an offense by using persuasion or other means likely to cause a normally law-abiding person to commit the offense.

Conduct merely affording the person an opportunity to commit an offense does not constitute entrapment. Ark. Code Ann. § 5-2-209(b)(2). Our law has been that, if a defendant denies committing an offense, he cannot assert that he was entrapped into committing the offense. *Heritage v. State*, 326 Ark. 839, 936 S.W.2d 499 (1996).

During his trial testimony, appellant denied committing the offense he had be accused

of committing. Accordingly, appellant's denial deprives him the right to now assert an entrapment defense.

In points sixteen and seventeen, appellant asserts that his counsel was ineffective due to his failure to raise an entrapment defense and failure to request a lesser-included offense instruction. Appellant raises these arguments for the first time on appeal. In order for a defendant to argue ineffective assistance of counsel on direct appeal, he must first have presented the claim to the lower court either during the trial or in a motion for new trial. *Nichols v. State*, 69 Ark. App. 212, 11 S.W.3d 19 (2000).

Points eighteen and nineteen are also raised for the first time on appeal. Appellant argues that the trial court erred in not allowing him to introduce "lesser included offenses" and when it refused to consider the lesser included offenses. As stated previously, we do not consider arguments raised for the first time on appeal. *Simmons v. State*, *supra*; *Taylor v. State*, *supra*.

In points twenty and twenty-one, appellant asserts that the trial court erred when it denied his motion to suppress. He specifically argues that (1) the information used to obtain the search warrant was the fruit of the poisonous tree, thus, the officers lacked probable cause for obtaining a search warrant and (2) the search of his home was illegal. Appellant's arguments are similar to those that were raised at trial. As stated above, appellant's counsel has addressed why the trial court did not err when it denied the motion to suppress and our review of the abstract confirmed that the trial court did not err when it denied appellant's

motion to suppress.

Accordingly, the record has been reviewed in accordance with Rule 4-3(j) of the Rules of the Arkansas Supreme Court and Court of Appeals. We conclude that there were no errors with respect to rulings adverse to appellant and that this appeal is without merit. Counsel's motion to be relieved is granted, and appellant's conviction is affirmed.

Affirmed, motion to be relieved granted.

PITTMAN, C.J., and BIRD, J., agree.